

FILED

STATE OF WASHINGTON  
OFFICE OF THE INSURANCE COMMISSIONER

2014 AUG 18 P 3 33

*In the Matter of*

Order No. 14-0081

**BENEFIT MARKETING  
SOLUTIONS, LLC and BENEFIT  
SERVICES ASSOCIATION,**

INSURANCE COMMISSIONER'S  
MOTION FOR RECONSIDERATION

Unregistered and Unauthorized  
Entities.

**I. INTRODUCTION**

The legislature has conferred primary jurisdiction of insurance regulatory matters on the Commissioner. Therefore, the courts routinely defer to the Commissioner by requiring entities challenging the Commissioner's authority and jurisdiction, to exhaust administrative remedies, and by giving substantial deference to the Commissioner's interpretation of the laws he enforces. The Courts have never required that the Commissioner defer to an improper attempt to circumvent an administrative hearing, filed by the target of regulatory action.

Further, where consumers may be harmed by the continued sale of a potentially illegal insurance product, a cease and desist order is the only means of halting the expansion of potential harm to consumers. The Order on Motion for Stay of Amended Cease and Desist Order entered on August 7, 2014, appears to 1) minimize the significant consumer risks posed by unauthorized products, and elevate the impact a cease and desist might have on Benefit Marketing Solutions, LLC and Benefit Services Association ("Benefit"), unauthorized entities; 2) require evidence of actual harm or actual complaints, a requirement not found in statute; and 3) accept conclusory characterizations about contracts that have not been submitted or reviewed by this tribunal. The effect is to create an untenable situation where potentially unauthorized entities are allowed to

1 continue to profit off a growing number of unaware and unprotected consumers.  
2 For these reasons, staff respectfully files this Motion For Reconsideration.

3  
4 **II. ARGUMENT**

5 **A. Because The APA, The UDJA, And The Courts Require Exhaustion**  
6 **Of Administrative Remedies, The Existence Of A Declaratory Action**  
7 **Designed To Circumvent An Administrative Hearing Should Not Be**  
8 **Grounds For Granting A Stay Of A Cease And Desist Order.**

9  
10 Under the Administrative Procedure Act, Title 34.05, RCW (APA),  
11 administrative remedies must be exhausted before judicial review of an agency  
12 order is available. RCW 34.05.534. The exhaustion requirement is founded on  
13 the principle that “the judiciary should give proper deference to that body  
14 possessing expertise in areas outside the conventional experience of judges.” *S.*  
15 *Hollywood Hills Citizens Ass’n for Pres. of Neighborhood Safety and Env’t v.*  
16 *King Cnty.*, 101 Wn.2d 68, 73, 677 P.2d 114 (1984), citing *Retail Store*  
17 *Employees Local 1001 v. Washington Surveying & Rating Bureau*, 87 Wn.2d  
18 887, 906, 558 P.2d 215 (1976). The courts have recognized that the  
19 Commissioner has initial authority over claims concerning the applicability of  
20 insurance statutes. *See Credit Gen. Ins. Co. v. Zewdu*, 82 Wn. App. 620, 625,  
21 919 P.2d 93 (1996). The courts have also recognized the significant assistance  
22 that the Commissioner’s expertise provides to the courts in interpreting insurance  
23 statutes. *Credit Gen. Ins.Co.*, 82 Wn. App. at 629 (“Because agency expertise  
24 would assist the court in interpreting the statutes applicable to this case, requiring  
25 exhaustion is appropriate, even though this case presents legal, rather than  
26 factual, issues.”).

1           There is no question that the Insurance Code provides that anyone  
2 aggrieved by any order of the Commissioner has the right to request a hearing  
3 from the Commissioner within 90 days. RCW 48.04.010(1)(b) & (3). There is  
4 also no question that the complaint for declaratory judgment filed by Benefit in  
5 Superior Court was filed to challenge the Commissioner's Cease and Desist  
6 order. Because the APA prohibits the challenge that Benefit has filed, until the  
7 administrative process has been complete there cannot be a "substantial" request  
8 for declaratory relief before the superior court. In fact, the Uniform Declaratory  
9 Judgment Act "does not apply to state agency action reviewable under chapter  
10 34.05 RCW." RCW 7.24.146. *See also NW Ecosystem Alliance v. Washington*  
11 *Forest Practices Bd.*, 149 Wn.2d 67, 82, 66 P.3d 614, 621 (2003) (refusing to  
12 address UDJA claims brought to challenge an agency rulemaking decision on the  
13 grounds that the APA is the exclusive means for judicial review of such agency  
14 decisions), *Ackerley Commc'ns, Inc. v. City of Seattle*, 92 Wn.2d 905, 908-09,  
15 602 P.2d 1177 (1979) ("Where a party affirmatively seeks declaratory or  
16 injunctive relief, however, it must show that its remedies have been exhausted in  
17 order to show it has standing to raise even a constitutional issue.").

18           Although the issues raised in Benefit's declaratory action require  
19 resolution, they do not require resolution by the Court at the expense of the  
20 administrative process and the Commissioner's authority. Neither Benefit, nor  
21 the Order granting the stay, explains why the issues needing resolution cannot be  
22 determined by the Hearings Officer and in compliance with the requirement to  
23 exhaust administrative remedies.

24           While permitting the administrative process to continue risks the  
25 possibility that the Court will hear the merits of the issues at the same time as the  
26

1 Hearings officer, the exhaustion requirement furthers several other judicial and  
2 administrative efficiencies:

3 The doctrine (1) prevents the premature interruption of the  
4 administrative process; (2) enables the agency to gather sufficient  
5 information to review and enforce the issue; (3) defers to the agency  
6 expertise; (4) establishes a more efficient process that allows the  
7 agency to fix its own mistakes; and (5) discourages individuals from  
8 ignoring administrative procedures by seeking judicial review.

9 *S. Hollywood Hills*, 101 Wn.2d at 73-74. Essentially, the exhaustion requirement  
10 “exists to insure, *inter alia*, that an adequate factual record is created, and that the  
11 agency's autonomy is protected.” *S. Hollywood Hills*, 101 Wn.2d at 76.

12 Because the stay entered by the Hearings Officer stayed not only the Cease  
13 and Desist, but also the entire adjudicative proceeding, all of these important  
14 purposes are frustrated by the stay granted in this case. Rather than preserving  
15 the administrative process, the stay interrupts the process. As a result of the stay,  
16 neither the Commissioner, nor the court, has sufficient information in the record  
17 to fully evaluate the application of the law to Benefit. Because the stay prevents  
18 the entry of a final order in this matter, the Court will not have the OIC's  
19 expertise in this matter to rely upon. Further, if as Benefit claims, the statutes  
20 cited by the Commissioner are not applicable, the stay gives the OIC no way to  
21 fix a potentially erroneous initial determination. Finally, the stay may have the  
22 effect of encouraging other licensees to attempt to circumvent the administrative  
23 remedies available to them. For these reasons, a stay of these proceedings in  
24 their entirety should be reconsidered.  
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26

1 **B. A Stay Of The Cease And Desist Order Will Expand The Potential**  
2 **Harm To Consumers.**

3 In addition, the stay of the Amended Cease and Desist Order will expand  
4 the potential consumer harm the Commissioner was seeking to correct in the first  
5 place. The order granting the stay minimizes the significant consumer risks  
6 posed by unauthorized products, focusing instead on the conclusory statements  
7 made by Benefit concerning the impact a cease and desist might have on business  
8 which is likely to be illegal. The Order also appears to require evidence of actual  
9 harm or actual complaints to the Commissioner in order to refuse a stay. This is  
10 not a requirement found in statute. Finally, it appears to accept the conclusory  
11 characterizations about the contracts Benefit claims to have in place, even though  
12 those contracts were not submitted nor reviewed by this tribunal, and do not  
13 appear to be authorized to cover risks in Washington State.

14 The order asserts that Washington policy holders do not “appear to be  
15 subject to substantial continuing risks” as the result of the stay. This minimizes  
16 the significant consumer risks posed by unauthorized products. Consumers  
17 typically have no way of knowing at the time they purchase an insurance product  
18 whether that product is authorized or not. This is particularly true when the  
19 insurance product is tied to the purchase of an object that is the real focus of the  
20 consumer’s attention in a transaction. Unfortunately, when an unauthorized  
21 product is used to induce a consumer to purchase another product, there are  
22 significant risks to consumers. See DeLeon Declaration.

23 One of the primary risks is the complete lack of financial oversight of  
24 companies selling unauthorized products. Typically, to obtain a certificate of  
25 authority as an insurance carrier, a company must undergo significant financial  
26 review by the OIC, and is subject to regular financial monitoring. Even entities

1 such as registered service contract providers, who qualify for exemptions from  
2 the burdensome financial requirements insurance carriers must meet, are still  
3 required to provide a significant amount of information about their financial  
4 condition to the Commissioner. These disclosures and review are required to  
5 ensure that consumers making claims will receive what they have contracted for.  
6 Unauthorized companies, who have been through none of this review, cannot  
7 legitimately claim that they satisfy the Washington State's requirements for  
8 solvency and financial health.

9 As long as an unauthorized entity is permitted to sell insurance without  
10 satisfying any of the requirements found in the Insurance Code, Title 48, RCW,  
11 the potential harm to consumers is allowed to dangerously expand. The most  
12 recent and notorious example of this dangerous expansion has harmed hundreds  
13 of consumers. See DeLeon Declaration.

14 In addition, the stay entirely ignores the personal liability to the employees  
15 and businesses where these products are sold. When a product being sold to a  
16 Washington consumer is not an authorized insurance product, RCW  
17 48.15.020(2)(b) makes anyone involved in the sale personally liable for ensuring  
18 the performance of the contract is carried out. This includes the unauthorized  
19 entity that created and solicited the unauthorized product, but can also include the  
20 business where the contract is sold, and the individual clerk or employee who  
21 provided the contract. For these reasons, the Insurance Commissioner, through  
22 his staff, generally issues Cease and Desist orders that are effective immediately  
23 when a sale of unauthorized insurance by an unauthorized company is found.  
24 This is the only effective way to limit the harm to all consumers, both policy  
25 holders, and businesses contracting with unauthorized carriers.  
26

1 The Order does not acknowledge the substantial potential harm  
2 Washington consumers face when an unauthorized entity sells insurance in this  
3 state. Instead it emphasizes the “significant adverse consequences” Benefit has  
4 purportedly suffered. However, the majority of the “adverse consequences”  
5 Benefit discussed were contrary to established law. For example, Benefit  
6 claimed that current contracts were in jeopardy, and current contract holders  
7 would lose their rights under the currently existing contracts. However, RCW  
8 48.15.020 requires that any entity involved in the sale of an unauthorized  
9 insurance product is personally liable for ensuring the performance of that  
10 contract. Therefore, Benefit cannot refuse to complete the terms of their current  
11 contracts.

12 The Order also appears to require evidence of actual harm or at least actual  
13 complaints to the Commissioner in order to refuse a stay. This is not a  
14 requirement found in statute. Further, it is not reasonable to expect consumers to  
15 file lawsuits over contracts that cover items that may cost less than the filing fees  
16 in court. While there is no express standard in the stay provision found in RCW  
17 48.04.020(2), the standard applicable to Superior Court is instructive. In RCW  
18 48.04.140(2), the legislature has provided that “A stay shall not be granted by the  
19 court in any case where the granting of a stay would tend to injure the public  
20 interest.” This does not require a showing of actual harm. Instead, where a stay  
21 would tend to create potential harm to consumers, as is the case here, a stay is  
22 inappropriate. Further, if Benefit has shared with its customers its belief that it is  
23 not offering an insurance product, it is hardly surprising that there are no  
24 complaints filed with the Commissioner. What Benefit did not provide, and what  
25 the OIC has authority to request of all authorized carriers, is how many  
26

1 consumers have complained to them, and what the ultimate resolution of those  
2 complaints involved.

3 Finally, the Order appears to accept the conclusory characterizations  
4 about the contracts Benefit claims to have in place, even though those contracts  
5 were not submitted nor reviewed by this tribunal, and do not appear to be  
6 authorized to cover risks in Washington State. Benefit has not even provided  
7 the name of the carrier that purportedly underwrites the CLIP policy.

8 Therefore, the OIC cannot agree that the policy, which the order relies on, is  
9 offered by a validly licensed entity, is approved by the Oklahoma  
10 Commissioner, or actually protects any entity other than Benefit. Based on the  
11 foregoing, the Motion for stay should be reconsidered and denied.

12  
13 DATED this 18<sup>th</sup> day of August, 2014.

14  
15 MIKE KREIDLER  
16 INSURANCE COMMISSIONER

17 BY:   
18 Marcia Stiekler  
19 Insurance Enforcement Specialist  
20 Office of Insurance Commissioner  
21  
22  
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25  
26

CERTIFICATE OF MAILING

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing **INSURANCE COMMISSIONER'S MOTION FOR RECONSIDERATION** on the following individuals in the manner indicated:

Hon. George Finkle, Chief Hearing Officer  
P O Box 40255  
Olympia, WA 98504-0255  
(XXX) Via Hand Delivery

**For Respondents:**

Gulliver Swenson, Counsel for Benefit Marketing Solutions, LLC  
Ryan, Swanson & Cleveland, PLLC  
1201 Third Avenue, Suite 3400  
Seattle, Washington 98101-3034  
[swenson@ryanlaw.com](mailto:swenson@ryanlaw.com)

(XXX) Via U.S. Regular Mail and Email

**SIGNED** this 18<sup>th</sup> day of August, 2014, at Tumwater, Washington.

  
\_\_\_\_\_  
Christine Tribe

STATE OF WASHINGTON  
OFFICE OF THE INSURANCE COMMISSIONER

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Order No. 14-0081

2014 AUG 19 A 10:05

DECLARATION OF  
MARTA U. DELEON IN SUPPORT  
OF MOTION FOR  
RECONSIDERATION  
(CORRECTED)

I, Marta U. DeLeon, am over the age of eighteen, and am competent and authorized to testify to the matters set forth herein, on the basis of first hand personal knowledge, unless the context clearly indicates otherwise. I declare as follows:

1. I am an Assistant Attorney General with the Washington State Attorney General's Office. I am the lead attorney assigned to advise and represent the Washington State Insurance Commissioner, Mike Kreidler, and the Washington State Office of the Insurance Commissioner ("OIC"). I have been the lead counsel to the Commissioner and the OIC since February 2009.

2. In my role as lead counsel, I have defended, and continue to defend, orders entered by the Commissioner against unlicensed and unauthorized entities soliciting insurance in the State of Washington.

3. Protecting consumers from companies that are soliciting insurance products without a certificate of authority to do so has been a focus of the OIC while I have been assigned as their lead counsel. The Insurance Commissioner has long taken the stance that allowing any unauthorized company to sell any unauthorized insurance product, poses a significant risk to consumers. In order to limit the expansion of consumer harm, the Commissioner typically issues an order to cease and desist whenever he finds the unauthorized sale of insurance.

1           4.       One example where the harm to consumers was significantly expanded by the  
2 lack of a Cease and Desist order is the NADC matter. I handled this matter on behalf of the  
3 OIC beginning in July 2009. On July 10, 2009, the OIC entered a Final Findings Of Facts,  
4 Conclusions Of Law And Order On Hearing, Docket No. D07-0149 (Final Order), against  
5 North American Dealer Co-Op, National Administrative Dealer Services, Inc., and  
6 Henry C. ("Hank") Bailey Jr., (collectively, "NADC").

7           5.       NADC had created a scheme that allowed car, RV, and boat dealers to increase  
8 their vehicle service contract by offering a "money back guarantee" to consumers who  
9 purchased a vehicle service contract. (For enforcement purposes, the vehicle service contracts  
10 were wholly unrelated to NADC and the "money back guarantee"). Dealers from around the  
11 country became members of NADC. These dealer members paid a fee to NADC for each  
12 vehicle service contract they sold. Dealer members were then able to tell consumers that if  
13 they did not use the vehicle service contract, they would be entitled to a refund of the entire  
14 amount of the vehicle service contract price (anywhere from \$1500-\$4700) when the vehicle  
15 service contract expired (anywhere from three to seven years). Although consumers did not  
16 pay any additional funds for this "money back guarantee," the dealer's fees for this program  
17 were typically rolled into the cost of the vehicle service contract. Further, consumers received  
18 a separate contract from NADC concerning the "money back guarantee." The fees dealers  
19 paid to NADC were purportedly deposited in a fund that would pay all "money back  
20 guarantee" claims, so that dealers would not have to pay claims directly.

21           6.       In April of 2007, NADC and a dealer member asked the OIC if this "money  
22 back guarantee" was legal in Washington State, even though NADC did not have a certificate  
23 of authority and was not otherwise registered under one of the statutory exemptions found in  
24 the Insurance Code. The OIC, via letter, informed NADC that its product met the definition  
25 of insurance, and that enforcement action would be taken if the company did not immediately  
26 cease selling its "money back guarantee" in Washington State. Before a Cease and Desist

1 order could be issued, NADC filed a request for a hearing, which at the time was treated as  
2 staying any further action, including entering a Cease and Desist order.

3 7. The Final Order, entered over two years later, ultimately found that the “money  
4 back guarantee” offered by NADC was in fact insurance, and ordered NADC to immediately  
5 cease and desist selling this “money back guarantee” to Washington State dealers and  
6 consumers. It also ordered NADC to notify all dealer members and consumers of the  
7 decision, by providing a copy of the Final Order. Although it was not necessary, the Final  
8 Order also required NADC to honor all valid claims made against the illegal “money back  
9 guarantee,” in compliance with RCW 48.15.020(2)(b).

10 8. NADC promptly appealed to Superior Court, where the Court entered a stay of  
11 the Final Order, including the provision that NADC Cease and Desist selling the “money back  
12 guarantee.” Rather than refusing to grant a stay where “a stay would tend to injure the public  
13 interest,” as required by RCW 48.04.140, the Court improperly attempted to balance what it  
14 perceived as limited potential harm to Washington consumers, against the impact the  
15 Final Order would have on the Washington portion of NADC’s national business. The Court  
16 also indicated its belief that allowing an unauthorized insurance product to be sold in  
17 Washington would somehow protect consumers seeking to take advantage of the program,  
18 apparently not understanding that RCW 48.15.020(2)(b) required all persons involved in the  
19 sale of NADC’s products to perform the terms of those contracts that had already been sold,  
20 regardless of whether the company was prohibited from selling to additional consumers.  
21 Finally, the Court accepted, without reviewing the actual policy, NADC’s representation that  
22 it had a liability policy from an out of state carrier to protect consumers in the event NADC  
23 was unable to pay valid claims. Once the policy held by NADC was actually reviewed, it was  
24 determined that it was a surety policy, not a liability policy, and that did not actually cover  
25 individual consumers.

1           9.     Because of the stay, NADC was allowed to continue selling an illegal  
2 insurance product to consumers until October 5, 2010, when the Superior Court entered an  
3 order affirming the Commissioner's Final Order. Without a Cease and Desist order in effect  
4 for the three years the NADC matter was pending, hundreds of Washington consumers  
5 continued to be induced into purchasing products from their dealers (the vehicle service  
6 contract) because of the promise of NADC's illegal "money back guarantee."

7           10.    Initially, NADC seemed to honor the terms of the Final Order. Unfortunately,  
8 because NADC was still not an authorized carrier, or a registered service contractor, the  
9 Commissioner continued to lack authority to review NADC's financial status, or to further  
10 order NADC to take corrective action should its claims reserves run low. The OIC also  
11 lacked authority to ensure that claims were being promptly paid.

12           11.    In fall of 2011, dealer members began to complain that NADC was not  
13 promptly paying claims. The OIC ultimately learned that the insurance carrier that had issued  
14 NADC's surety policy, and the administrator NADC contracted with to hold the fees paid by  
15 NADC members, were insolvent. NADC failed to pay claims as it attempted to sue the  
16 insurance carrier and the administrator.

17           12.    Because the NADC policy was a surety policy, not a liability policy, it was not  
18 covered by the guarantee fund in the state where NADC's insurance carrier was located.  
19 Therefore, neither NADC, nor the dealer members, were permitted to file claims with the  
20 guarantee fund where the carrier is in receivership. Individual consumers have been barred  
21 from filing claims in the receivership matter.

22           13.    Shortly thereafter, NADC and NADS declared bankruptcy. Mr. Bailey could  
23 not be located. The OIC later learned that he had relocated to Mexico for a time. When  
24 Mr. Bailey returned to the U.S., the OIC filed a claim to enforce the Final Order against  
25 Mr. Bailey. That matter is pending in Thurston County Superior Court.  
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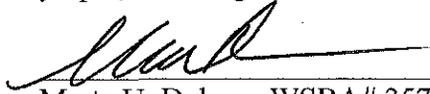
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25 Mr. Bailey. That matter is pending in Thurston County Superior Court.  
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1 14. Without NADC to pay the "money back guarantee" claims, individual dealers  
2 were left liable, under RCW 48.15.020(2)(b), for payment of the "money back guarantee."  
3 Unfortunately, not all dealers remained solvent themselves. Some dealers, such as the  
4 Olympic Boat Center, became insolvent, leaving consumers without any clear recourse for  
5 receiving the promised "money back guarantee." The OIC regularly forwards consumers who  
6 have not received payment for their claims to my office. I receive roughly 1-3 calls or emails  
7 per week concerning consumers who have been harmed by NADC's failure to pay their valid  
8 reimbursement claims. The majority of these consumers was customers of Olympic Boat  
9 Center, and purchased policies during the administrative proceedings against NADC.

10 15. Because consumers were unwittingly allowed to purchase an illegal insurance  
11 product for over three years while the OIC's initial determination was challenged, without any  
12 notice that the legality of product they were accepting was subject to a regulatory challenge,  
13 there will be consumers well into 2017, who will continue to be harmed by the fact that  
14 NADC was allowed to continue to sell their product, without regulation or limit, and over the  
15 Commissioner's objection, until October 2010.

16 I declare under penalty of perjury under the laws of the State of Washington that the  
17 foregoing is true and correct.

18 SIGNED this 14 day of August, 2014 at Olympia, Washington.

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21 Marta U. Deleon, WSBA# 35779